AN ARGUMENT OF LAW CONCERNING The BILL of ATTAINDER OF High-Treason OF THOMAS Earle of *Strafford*:

At a Conference in a Committee of both Houſes of Parliament.

By Mr. St. JOHN his *Majeſties* Solicitor GENERALL.

Publiſhed by order of the Commons Houſe.

LONDON,
Printed *Anno Domini* 1641.

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THOMAS

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As a Conclusion in a Controversie

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Mr. St. JOHN's Argument.

My Lords,

THE Knights, Citizens, and Burgeſſes of the Commons Houſe of Parliament have paſſed a Bill for the attainting of *Thomas* Earle of *Strafford* of High-Treaſon. The Bill hath beene tranſmitted from them to your Lordſhips. It concernes not him alone, but your Lordſhips and the Commons too, though in different Reſpects.

It is to make him as miſerable a man, as man or Law can make him.

Not loſſe of life alone, but with that, of honour, name, poſterity, and eſtate; Of all that's deare to all.

To uſe his owne expreſſion, an eradication of him both root and branch, as an *Achan*, a troubler of the State, as an execrable, as an accurſed thing.

This Bill, as it concernes his Lordſhip, the higheſt that can be in the penall part, ſo doth it on the other ſide as highly concerne your Lordſhips and the Commons in that which ought to be the tendreſt, the Judicatory within, that that judge not them who judge him: And in that which is moſt ſacred amongſt men, the publick Juſtice of the Kingdome.

The Kingdome is to be accounted unto for the loſſe of the meaneſt member, much more for one ſo neare the head.

The Commons are concerned in their Account for what is done, your Lordſhips in that which is to be done.

The buſineſſe therefore of the preſent Conference, is to acquaint your Lordſhips with thoſe things that ſatisfied the Commons in paſſing of this Bill, ſuch of them as have come

within my capacity, and that I can remember, I am commanded from the Commons at this time to present unto your Lordships.

My Lords, in Judgements of greatest moment, there are but two wayes for satisfying those that are to give them, Either the *Lex lata*, the Law already established, Or else the use of the same power for making new Lawes, whereby the old at first received life.

In the first consideration, of the setled Lawes; In the degrees of punishment the positive Law received by generall consent, and for the common good is sufficient to satisfie the conscience of the Judge in giving judgement according to them.

In severall Countreys there is not the same measure of punishment for one and the same offence. Wilfull murder in *Ireland* is Treason, and so is the wilfull burning of a house or stack of Corne. In the Isle of *Man*, it's felony to steale a Hen, but not to steale a Horse; and yet the Judge in *Ireland* hath as just a ground to give judgement of high Treason in those Cases there, as here to give judgement only of felony, and in the Isle of *Man* of felony for the Hen, as here of petty Larceny.

My Lords, in the other consideration of using the Supreame power, the same Law gives power to the Parliament to make new Lawes, that enables the inferiour Court to judge according to the old: The rule that guides the conscience of the Inferiour Court is from without, the prescripts of the Parliament and of the Common Law; in the other the rule is from within; That *salus populi* be concerned; That there be no wilfull oppression of any the fellow members, that no more blood be taken than what is necessary for the Cure, the Laws and Customes of the Realme as well enable the exercise of this, as of the ordinary and judiciall power.

My Lords, what hath beene said, is because that this proceeding of the Commons by way of Bill, implyes the use of the meere *Legislative* power, in respect new Lawes are for the most part past by Bill.

This, my Lords, though just and Legall, and therefore not wholly excluded, yet it was not the only ground that put the

Commons

Commons upon the Bill, they did not intend to make a new Treason, and to condemne my Lord of *Strafford* for it, they had in it other Considerations likewise, which were to this effect.

1 First, the Commons knew that in all former ages, if doubts of Law arose upon cases of great and generall Concernment, the Parliament was usually consulted withall for resolution; which is the reason that many Acts of Parliament are only declarative of the Old Law, not introductive of a new, as the great Charter of our Liberties; the Statute of the five and twentieth yeere of *Edward* the third, of Treasons; the Statute of the Prerogative, and of late the petition of Right. If the Law were doubtfull in this Case, they conceived the Parliament (where the old may bee altered, and new Lawes made) the fittest Judge to cleare this doubt.

2 Secondly, my Lords, they proceeded this way to out those scruples and delayes, which through dis-use of proceedings of this nature might have risen in the manner and way of proceeding, since the Statute of the first of *Henry* the fourth, the seventeenth chapter, and more fully in the Roll, number 144. The proceedings in Parliament have usually beene upon an Inditement, first found, though in Cases of Treason particularly mentioned in the Statute of the five and twentieth yeare of *Edward* the third, which had not beene done in this Case: Doubts likewise might rise for Treasons, not particularly mentioned in the Statute of 25. *Edw.* 3. whether the declaratory power of Parliament be taken away, and if not taken away, in what manner they were to be made, and by whom. They finde not any Attainders of Treason in Parliament for neere this 200 yeeres, but by this way of Bill. And againe, they knew that whatsoever could be done any other way, it might be done by this.

3 Thirdly, in respect of the proofes and depositions that have beene made against him; for first, although they knew not but that the whole Evidence which hath beene given at the Barre, in every part of it is sufficiently comprehended within the Charge, yet if therein they should be mistaken, if it should prove otherwise, use may justly be made of such Evidence in this way of Bill, wherein so as Evidence be given in, it's no

way requiſite that there ſhould have beene any Articles or Charge at all. And ſo in the Caſe of double Teſtimony upon the Statute of the firſt of *Edward* the ſixt, whether one direct witneſſe with others to Circumſtances, had beene ſingle or double Teſtimony; and although ſingle Teſtimony might be ſufficient to ſatisfie private Conſciences, yet how farre it would have been ſatisfactory in a judiciall way where formes of Law are more to be ſtood upon, was not ſo cleare; whereas in this way of Bill private ſatisfaction to each mans Conſcience is ſufficient, although no evidence had been given in at all.

My Lords, the proceeding by way of Bill, it was not to decline your Lordſhips Juſtice in the judiciall way; In theſe Exegencies of the State and Kingdome, it was to husband time by ſilencing thoſe doubts: they conceived it the ſpeedieſt and the ſureſt way.

My Lords, Theſe are in effect the things the Commons tooke into their Conſideration, in reſpect of the manner, and way of proceeding againſt the Earle. In the next place I am to declare unto your Lordſhips, the things they tooke into their Conſideration, in reſpect of the matter and merits of the Cauſe; They are comprehended within theſe ſix heads.

1. That there is a Treaſon within the Statute of 25. *E.* 3. by Levying of warre upon the matter of the fifteenth Article.

2. If not by actuall levying of war, yet by adviſing and declaring his intention of war, and that by *Savils* warrant, and the advice of bringing over the Iriſh Army, upon the matter in the 23. Article; The intending of a Warre, if not within the Clauſe of Levying Warre in the Statute of 25. *E.* 3. yet within the firſt Treaſon of compaſſing the death of the King.

3. If neither of theſe two ſingle Acts be within the Statute of 25. *E.* 3. yet upon putting all together, which hath bin proved againſt him, That ther's a Treaſon within the firſt clauſe of compaſſing the death of the King.

Et ſi non proſunt ſingula, juncta juvant.

4. That he hath ſeſſed and laid Souldiers upon the Subjects of *Ireland* againſt their will, and at their Charge, within the *Iriſh* Statute, of the eighteenth yeare of *Henry* the ſixt. That both perſon and thing are within the Stature, That the Statute remaines in force to this day, That the Parliament here hath Cogni-

Cognizance of it. And that even in the ordinary way of Judicature, that if there be a Treason, and a Traitor, that the want of jurisdiction in the Judicall way, may justly be supplied by Bill.

5. That his endeavouring to subvert the fundamentall Lawes and Governement of the Realmes of *England* and *Ireland*, and instead thereof, to introduce a tyrannicall Government against Law, is Treason by the Common Law. That Treasons at the Common Law are not taken away by the Statutes of 25. *E.* 3. 1. *H* 4. *c.* 10. 1. *Mar. c.* 1. nor any of them.

6. That as this Case stands, It's just and necessary to resort to the Supreame power in Parliament, in case all the rest should faile.

Of these six, five of them are Treason, within the Compasse of the Lawes already established, Three within the Statute of 25 *E.* 3, One within the *Irish* Statute, the other by the Common Law of *England*.

If but any one of these six Considerations hould, The Commons conceive that upon the whole matter they had good cause to passe the Bill.

My Lords, for the first of levying Warre, I shall make bold to read the Case to your Lordships before I speake to it; its thus:

The Earle did by warrant under his hand and Seal give authority to *Robert Savill* a Serjeant at Arms, and his Deputies, to sesse such number of Souldiers, horse and foote of the Army in *Ireland* together with an officer, as the Serjeant should think fit, upon his Majesties Subjects of *Ireland* against their will; This warrant was granted by the Earle to the end to compell the Subjects of *Ireland* to submit to the unlawfull Summons and orders made by the Earle upon paper Petitions exhibited unto him in case of private Interest betweene party and party; This warrant was executed by *Savill* and his Deputies by sessing of Souldiers both horse and foote, upon divers of the Subjects of *Ireland* against their will in war-like manner, & at divers times the Souldiers continued upon the parties upon whom they were sessed, and wasted their goods, untill such time as they had submitted themselves unto those Summons and orders.

My

My Lords, This is a levying of warre within the ſtatute of 25. *E.* 3. The words of the Statute are, *If any man doe levy warre againſt our Lord the King in his Realm*, this is declared to be Treaſon.

I ſhall indeavour in this to make it appeare to your Lordſhips.

1 What ſhall be a levying of Warre, in reſpect of the motive or cauſe of it.

2 What ſhall be ſaid a levying of warre in reſpect of the Action or thing done.

3 And in the third place, I ſhall apply them to the preſent Caſe.

It will be granted in this of levying of warre, That forces may be raiſed and likewiſe uſed in a war-like manner, and yet no levying of warre within the Statute, that is, when the forces are raiſed and imployed upon private ends either of revenge or intereſt.

Before this Statute in *E.* 1. time. The Title of a Caſtle was in diſterence between the Earles of *Hereford* and *Gloſter*, for the mainetaining of the poſſeſſion on the one ſide, and gayning of it on the other, Forces were raiſed on either ſide of many hundred men, they marched with Banners diſplayed one againſt the other. In the Parliament in the 20. yeere of *Edw.* 1. this adjudged onely treſpaſſe, and either of the *Earles* fined 1000. markes a peece.

After the Statute in Hillary Terme, the fiftieth yeere of *Edward* the third, in the *Kings Bench*, *Rot.* 3. *Nicholas Hunter-rome* in a war-like manner, with 40 men armed, amongſt other weapons, with Gunnes (ſo ancient as appeares by that Record they were) did much ſpoyle in the Mannour of the *Abbee* of *Dorcheſter*, in the *County* of *Oxford*: This no Treaſon: So it hath beene held by the Judges, that if one or more Townſhips upon pretence of ſaving their Commons, doe in a forcible and war-like manner, throw in Incloſures; This is only a Riot, no Treaſon.

The words of the Statute of 25. *Edw.* 3. cleare this Point, that if any man ride armed openly or ſecretly with men at Armes againſt any other to kill and robbe, or to detaine him untill he hath made fine and ranſome for his deliverance; this

is declared not to be Treason, but Fellony or Trespasse, as the case shall require, all the printed Statuts which have it coverly or secretly are mis-printed; for the words in the Parliament Roll, as appeares n. 17. are *Discovertment ou secreretment* openly or secretly.

So that my Lords, in this of levying warre, the Act is not so much to be considered, but as in all other Treasons and Fellonies, *quo animo*, with what intent and purpose.

Obj. My Lords, if the end be considerable in levying war; it may be said, that it cannot be a Treason warre, unlesse against the King: For the wordes of the statute are, *If any man levy warre against the King.*

Ans. That these words extend further then to the Person of the King appeares by words of the Statute, which in the beginning declares it to be Treason to compasse and imagine the Kings death, & after other Treasons, this is to be declared to be Treason to levy war against the King. If the levying of war extend no further then to the person of the King. These words of the Statute are to no purpose, for then the first Treason of compassing the Kings death had fully included it before, because that he which levyes warre against the person of the King doth necessarily compasse his death.

Its a warre against the King when intended for alteration of the Lawes or Government in any part of them, or to destroy any of the great Officers of the Kingdome. This is a levying of Warre against the King.

1 Because the King doth protect and maintaine the Laws in every part of them, and the great Officers to whose care he hath in his own steed delegated the Execution of them.

2 Because they are the Kings Lawes, He is the Fountaine from whence in their severall Chennels, they are derived to the Subject, all our inditements run thus, Trespasses laied to be done, *Contra pacem Domini Regis*, the Kings peace for exorbitant offences, though not intended against the Kings Person, against the King his Crowne and Dignity.

My Lords, this construction is made good by diverse Authorities of great weight ever since the statute of 25. *E.* 3. down-wards.

In *R.* the 2d. time Sir *Thomas Talbot* conspired the death of the Duke of *Gloucester* and *Lancaster*, & some other of the Peeres, for the effecting of it, he had caused diverse people in the County of *Chester* to be armed in warre-like manner, in Assemblies. In the Parliament held the seventeenth yeere of *Richard* the second, number the 20. Sir *Thomas Talbot* accused of high Treason for this; Its there declared,

 that

that insomuch as one of them was Lord high Steward of *England*, and the other high Constable of *England*, that this was done in destruction of the estates of the Realme, and of the Lawes of the Kingdome, and therefore adjudged Treason; and the judgement sent downe into the Kings Bench, as appeares *Easter-Tearme* in the seventh yeere of *Richard* the second in the Kings Bench, *Rott.* 16. These two Lords had appeared in the eleventh yeere of *Richard* the second in mainetenance of the Act of Parliament made the yeere before; one of them was of the Commissioners appointed by Parliament, & one of the Appellours of those that would have overthrowne it: The Duke of *Lancaster* likewise was one of the Lords that was to have beene indicted of Treason for endeavouring the maintenance of it, and therefore conspiring of their deaths is said to be in destruction of the lawes; This there declared to be a Treson that concerned the Person of the King and the Commonwealth.

In that great insurrection of the Villains and meaner people in *Richard* the seconds time, they tooke an oath; *Quod Regi & Comunibus fidelitatem servarent*, to be true to the King and Commons, that they would take nothing but what they paid for, punished all theft with death, here's no intendment against the person of the King; The intent was to abolish the Law of villainage and servitude, to burne all the Records, to kill the Judges; this in the Parliament of the fifth yeere of *Richard* the second, number the one and thirtieth and two and thirtieth, the first part, is declared to be Treason against the King and against the Law.

In the eleventh yeere of *Richard* the second, in Parliament the raising of forces against the Commissioners appointed by act of Parliament the yeer before adjudged Treason by all the Judges.

The Statute of 1. *Mar. cap.* 12. enacts that if twelve or more shall indeavour by force to alter any of the Lawes or Statutes of the Kingdome, he shall from such a time there limited be adjudged onely as a fellon; This act was to continue but to the next Parliament, it is expired; it shewes by the words onely that the offence was higher before the making of it.

My Lords, In Queene *Elizabeths* time, *Grant* & divers Prentices of *London* to the number of 200. rose and assembled at Tower-hill, carried a Cloake upon a Pole instead of a banner, their intent was to deliver divers Prentices out of prison that had been committed upon a sentence in Star-Chamber for ryots, To kill the Lord Major of *London*, and for setting prizes on victuals. In *Trinity Tearme* 37. *Eliz.*

Eliz. divers of the Judges consulted withall, and resolved that this was a levying of warre against the Queene, being intended against the government and officers of the Queen, and thereupon *Grant* and others executed as Traitors.

Afterwards in that Queenes time, divers of the County of *Oxford* consulted together to goe from house to house in that County, and thence to *London* & other parts to excite them to take Armes for the throwing in of all inclosures throughout *England*, nothing was done, nor no Assembly: The Statute of 13. *Eliz. cap.* 1. during the Queenes life made it Treason to intend or advise to levy war against the Queene.

In *Easter Tearme*, 39. *Eliz.* All the Iudges of *England* met about the case, it was resolved by them, that this was a warre intended against the Queen, they agreed that if it had been of one Towneship or more upon private interest and claime of right of Common, it had not bin Treason; But this was to throw in all inclosures thorough the Kingdome, wherto these parties could pretend no claime; that it was against the Law, in regard that the Statute of *Merton* gave power of Inclosures in many Cases. Upon this Resolution *Bradshaw* & *Burton* were executed at *Aynestowe* hill in *Oxford-shire*, the place where they intended their first meeting.

So that, my Lords, if the end of it be to overthrow any of the Statutes, any part of the Law and setled Governement, or any of the great Officers intrusted with the execution of them; this is a warre against the King.

My Lords, it will be further considerable, what shall be accounted a leavying of warre, in respect of the Actions & things done; There's a designe to alter some part of the Lawes and present Governement, for the effecting thereof people be provided of Armes, gathered together into troopes, but afterwards march not with Banners displayed, nor do *Bellum percutere*. Whether the arming themselves and gathering together upon this Designe, whether this be a war or such prosecution of the Designe with force as makes it Treason within the Statute?

First, If this be not a Warre in respect that it necessarily occasions hostile preparations on the other side?

2. From the words of the Statute, shall levy warre, and be thereof probably attainted of open Deed by people of their Condition, although the bare conspiring be not an open Deed, yet whether the arming and drawing men together be not an open Declaration of Warre?

In Sir *Thomas Talbots* case before cited in the seventeenth yeere of *Richard* the second, The Acts of force are expressed in the Parliament Roll. That he caused divers of the people of the County of *Chester* to be armed in a war-like manner in assemblies; heere is no marching, no banners displayed.

In the eight yeare of *Henry* the 8th. *William Bell* and *Thomas Lacy* in *Com' Kanc.* conspired with *Thomas Cheney*, called the *Hermite* of the Queene of Faires to overthrow the Lawes and customes of the Realme, and for the effecting of it, they with two hundred more met together, and concluded upon a course of raising greater forces in the county of *Kent*, and the adjacent Shires, this adjudged Treason, these were open Actes.

My Lords, for the application of both these to the Case in question First in respect of the end of it, here was a warre against the King, It was to subvert the Lawes, This being the designe, for the effecting of it, he assumed to his own person, an arbitrary power over the lives, liberties and estates of his Majesties Subjects and determined Causes upon paper petitions at his own will and pleasure, obedience must be forced by the Army, this declared by the Warrant.

My Lords, if it be said, That the Warrant expresseth not any intent of subverting the Lawes, It expresseth fully one of the principall meanes whereby this was to be done, that is, obedience to his arbitrary orders upon paper petitions, this was done in reference to the maine designe.

In the Cases of the Towne of *Cambridge* and Sr. *William Cogan*, that have formerly been cited to your Lordships, upon other occasions, the things in themselves were not Treason, they were not a levying of Warre.

In that of *Cambridge*, the Towne met together, and in a forcible manner broke up the University treasury, and tooke out of it the Records and Evidence of the liberties of the Vniversity over the Town.

In the other, they of *Bridgewater* marched to the Hospitall, and compelled the Master of the Hospitall to deliver unto them certaine Evidences that concerned the Towne, and forced him to enter into a bond of two hundred pound.

These, if done upon these private ends alone, had not been Treason, as appeares by the very words of the Statute of 25. *Edw.* 3. before mentioned of marching openly or secretly.

But my Lords, these of *Cambridge* and *Bridgewater*, they were of the conspiracy with the villaines, as appeares in the Parliament Roll

of

of the first yeare of *Richard* the second, number the one and thirtieth, & two and thirtieth, where the Towns of *Cambridge* and *Bridgewater* are expresly excepted out of the generall pardon made to the Villaines. This being done in Reference to that designe of the villaines of altering the Lawes, this was that which made it Treason.

If the designe went no further then the enforcing obedience to these paper orders made by himselfe, It was sufficient, it was to subvert one fundamentall part of the Lawes, nay in effect the whole Law: what use of Law if he might order and determine of mens estates at his own pleasure? This was against the Law notoriously declared in *Ireland*.

In the close roll in the Tower, in the five and twentieth yeer of *Ed.* 1. a Writ went to the Justices in *Ireland* (that Kingdome at that time was governed by Justices) declaring that upon petitions they were not to determine any titles betweene party and party upon any pretence of profit whatsoever to the King.

6 In the eight and twentieth yeare of *Henry* the sixt, the second Chapter, Suites in equity, not before the Deputy, but in Chancery, Suits at Common Law, not before him, but in Cases of life in the Kings Bench, for title of land or goods in the proper Courts of the Common pleas, or Kings Bench,

This declared in the Instructions for *Ireland* in the latter end of King *James* his time, and by the Proclamation in his Majesties t me, my Lord took notice of them, called the Commissioners narrow-hearted Commissioners.

The Law said, he should not thus proceed in subversion of it; he saith, he will, and will enforce obedience by the Army. This is as much in respect of the end, as to endevour the overthrow of the Statutes of Laborers, of victuals, or of *Merton* for Inclosures. Here is a warre against the King in respect of the end.

2 In respect of the Actions, whether there be either a levying of war, or an other deed, or both.

My Lords, there was an Army in *Ireland* at that time of two thousand horse and foot, by this Warrant there is a full designation of this whole Army, and an Assignement of it over unto *Savill* for this purpose. The Warrant gives him power from time to time to take as many souldiers, horse and foot, with an Officer, throughout the whole Army as himselfe shall please, heere is the terrour and awe of the whole Army to enforce obedience. My Lords, if the Earle had armed two thousand men, horse and foot, and formed them into companies to this end, your Lord-

ſhips would have conceived that this had been a warre, It's as much as in the caſe of Sir *Thomas Talbot* who armed them in aſſemblies.

This is the ſame with a breach of truſt added to it. That Army was firſt raiſed and afterwards committed to his truſt for defence of the people, is now deſtined by him to their deſtruction. This aſſignation of the Army by his Warrant under his hand and ſeale is an open Act.

Ob. My Lords, heer's not onely an open act done, but a levying of war, ſouldiers both horſe and foot, with an Officer in warlike manner ſeſſed upon the ſubject, which killed their Cattell, conſumed and waſted their goods.

Ob. O, but five or ſixe were the moſt imployed at any time, a mighty warre of ſix men, ſcarce a Ryot.

Your Lordſhips obſerve a great difference where ſix ſingle men goe upon a deſigne alone, and when ſent from an Army of ſix hundred, all engaged in the ſame ſervice, ſo many were ſent as were ſufficient to execute the command; if upon a poore man fewer, more upon a rich; if the ſix had not beene able, the whole Army muſt make it good; the reaſon that the Sheriffe alone, or but with one Bayliffe to doe execution, is, becauſe he hath command of the Law, the Kings Writ and the *poſſe Comitatus* in caſe of Reſiſtance; heer's the warrant of the Generall of an Army, heer's the *poſſe exercitus*, the power of the Army, under this awe of the whole Army, ſix may force more then ſixty without it, and although never above ſix in one place, yet in the ſeverall parts of the Kingdome at the ſame time might be above ſixty; for ſeſſing of ſouldiers was frequent, it was the ordinary courſe for execution of his orders.

The Lord Lievtenant of a County in *England* hath a deſigne to alter the Lawes and government, nay admit the deſign goes not ſo high, he onely declares thus much, that he will order the freeholds and the eſtates of the Inhabitants of the County at his owne will and pleaſure, and doth accordingly proceed upon paper petitions; foreſeeing there will be diſobedience, he grants out warrants under his hand and ſeale to the deputy Lieutenants and Captaines of the traine bands, that upon refuſall they ſhall take ſuch number of the traine bands thorow the County with Officers, as they ſhall think good, and lay them upon the lands and houſes of the refuſers; Souldiers in a warlike manner are frequently ſeſſed upon them accordingly. Your Lordſhips doe conceive that this is a levying of Warre within the Statute.

The Caſe in queſtion goes further in theſe two reſpects.

1. That

1 That it is more against the declared Law in *Ireland*, not only against the Common Law, but likewise against the Statute of the eight and twentieth yeare of *Henry* the sixt, against the Acts of the Commissioners, against Proclamations in pursuance of the Law, against that himselfe took notice of, Narrow hearted Commissioners.

2 In this that here was an Army, the Souldiers, Souldiers by profession, Acts of hostility from them of greater Terror than from free-holders of the same County.

My Lords, I have now done with the first of levying warre.

2 The second is the machination, the advising of a warre; The case in this rests upon the warrant to *Savill*, and the advice in the 23 Article.

The Warrant shewes a resolution of employing the old Army of *Ireland*, to the oppression of his Majesties Subjects and the Lawes.

In the 23 Article, having told his Majesty that he was looſed and absolved from rules of Government, and might doe every thing which power might admit, he proceeded further in speech to his Majesty, in these words; You have an Army in *Ireland* you may employ to reduce this Kingdome.

My Lords, both being put together, there's a machination, a practise, an advise to levie warre, and by force to oppresse and destroy his Majesties Subjects.

Obj. It hath beene said, the Statute of 25. *Edw.* 3. is a penall Law, and cannot bee taken by equity and construction, there must be an actuall warre; the Statute makes it Treason to counterfeit the Kings Coyne, the conspiring, the raising of furnaces is no Treason, unlesse he doth *nummum percutere*, actually coyne.

Answ. My Lords, this is only said, not proved, the Law is otherwise, 19. of *Henry* the sixt, fol. 47. there adjudged that the conspiring and ayding to counterfeit coyne was Treason; and Justice *Stamford* fol. 3. & 44. is of opinion, That this, or conspiring to counterfeit the great Seale is Treason. The Statute is, If any shall counterfeit the great Seale, conspiring to doe it by the book, is Treason; if a man take the broad Seale from one Patent, and put it to another, here is no counterfeiting, it's *tunt amount*, and therefore Treason, as is adjudged in 2. *Henry* 4. *fo.* 25. and by the opinion of *Stamford*.

If machination or plotting a warre be not within that clause of the Statute of levying warre, yet it's within the first of compassing the death of the King, as that which necessarily tends to the destruction both of the King and of the people, upon whose safety and protection

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he is to engage himselfe: That this is Treason, hath beene adjudged both after the Statutes of the first of *Henry* the fourth, chapter the tenth, and the first of Queene *Mary*, the first chapter, so much insisted upon on the other side. In the third yeare of King *Henry* the fourth, one *Balshall* comming from *London*, found one *Bernard* at plough in the parish of *Ofley* in the Connty of *Hertford*; *Bernard* asked *Balshall*, what news, he told him the newes was, That King *Richard* the second was alive in *Scotland* (which was false, for he was then dead) and that by *Midsomer* next be would come into *England*; *Bernard* asked him, what was best to be done; *Balshall* answered, get men, and goe to King *Richard*. In *Michaelmas* Terme, in the third yeare of *Henry* the fourth, in the Kings Bench, rot. 4. this advise of warre adjudged Treason.

In Queene *Maries* time, Sir *Nicholas Throgmorton* conspired with Sir *Thomas Wyat* to levie warre within this Realme for alteration in Religion, he joyned not with him in the execution. This Conspiracy alone declared to be Treason by the Judges. This was after the Statute of the first of Queene *Mary* so much insisted upon. That Parliament ended in *October*, this opinion was delivered the *Easter*-Terme after, and is reported by Justice *Dyer*, *fo.* 98. It's true, Sir *Thomas Wyat* afterwards did levie warre, Sir *Nicholas Throgmorton* he only conspired, this adjudged Treason.

Storie, in Queene *Elizabeths* time, practised with Forreiners to levy warre wirhin the Kingdome, nothing done in pursuance of the practise. The intent without any adhering to Enemies of the Queene or other cause, adjudged to be Treason, and he executed thereupon. It's true my Lords, that yeare 13. *Elizabeth* by Act of Parliament, it's made Treason to intend the levying of warre, this case was adjudged before the Parliament. The case was adjudged in *Hillary* Terme, the Parliament began not untill the *April* following; This my Lords, is a case adjudged in point, That the practising to levy warre, though nothing be done in execution of it is Treason.

Obj. It may be objected that in these Cases, the conspiring being against the whole Kingdome included the Queene, and was a compassing her destruction, as well as of the Kingdomes, here the advice was to the King.

Ans. 1. The answer is, first, that the warrant was unknowne to his Majesty, that was a machination of warre against the people and Laws, wherein his Majesties person was engaged for protection.

2. That the advice was to his Majesty, aggravates the offence, it

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was an Attempt not only upon the Kingdome, but upon the Sacred perſon, and his office too; himſelfe was *hoſtes patriæ*, hee would have made the Father of it ſo too; nothing more unnaturall, more dangerous; To offer the King poyſon to drink, telling him that it is a Cordiall, is a compaſsing of his death. The poyſon was repelled, there was an antidote within, the malice of the giver beyond expreſsion. The perſwading of Forreiners to invade the kingdome holds no proportion with this: Machination of warre againſt the Lawes or kingdome is againſt the King, they cannot be ſevered.

My Lords, if no actuall warre within the Statute, if the counſelling of a war, if neither of theſe ſingle Acts be Treaſon within the Statute; The Commons in the next place have taken it into their conſideration, what the addition of his other words, Counſells, and Actions do operate in the caſe, and have conceived, That with this addition all being put together, that he is brought within the Statute of 25. *Edward* 3. The third generall Head.

The words of the Statute are, if any man ſhall compaſſe or imagine the death of the King, the words are not, if any man ſhall plot or conſult the death of the King, no my Lords, they go further than to ſuch things as are intended immediately, directly, and determinatively againſt the life and perſon of the King, they are of a larger extent; to compaſſe is to doe by circuit, to conſult or practice another thing directly, which being done, may neceſſarily produce this effect.

However it be in the other Treaſons within this Statute, yet in this by the very words there is roome left for conſtructions, for neceſſary Inferences and Conſequences.

What hath beene the judgement and practice of former times concerning theſe words of compaſsing the Kings death, will appeare to your Lordſhips by ſome caſes of attainders upon theſe words.

One *Owen* in King *Iames* his time in the 13. yeere of his raigne at *Sandwich* in *Kent*, ſpake theſe words, That King *Iames* being excommunicated by the Pope, may bee killed by any man; which killing is no murther: being asked by thoſe he ſpake to, how he durſt maintaine ſo bloody an aſſertion? he

answered that the matter was not so haynous as was supposed; for the King who is the lesser, is concluded by the Pope who is the greater; and as a Malefactor being condemned before a Temporall Judge, may bee delivered over to bee Executed; so the King standing convicted by the Popes sentence of excommunication, may justly be slaughtered without fault; for the killing of the King is the execution of the Popes supreame sentence, as the other is the execution of the Law: for this, judgement of High-Treason was given against him, and execution done.

My Lords, here is no cleere intent appearing that *Owen* desired the thing should bee done, only Arguments that it might be done, This is a compassing, there is a cleere Endeavour to corrupt the judgement, to take off the bonds of conscience, the greatest security of the Kings life; God forbid saith one of better judgement than he, That I should stretch out my hand against the Lords annointed, no saith he, the Lord doth not forbid it, you may for these reasons lawfully kill the King.

Hee that denies the Title to the Crown, and plots the meanes of setting it upon another head, may doe this without any direct or immediate desiring the death of him that then weares it, yet this is Treason, as was adjudged in 10. *Henry* 7. in the case of *Burton*, and in Duke of *Norfolks* case. 13. *Elizabeth*.

This is a compassing of his death, for there can no more be two Kings in one Kingdome, than two Suns in the Firmament; he that conceives a title, counts it worth ventring for, though it cost him his life, he that is in possession thinks it as well worth the keeping. *Iohn Sparhauke* in King *Henry* the fourths time, meeting two men upon the way, amongst other talk said, that the King was not rightfull King, but the Earle of *March*, and that the Pope would grant indulgencies to all that would assist the Earles title, and that within halfe a yeree there would be no Liveries nor Conizances of the King, that the King had not kept promise with the people, but had layd taxes upon them. In *Easter* Terme in the third yeere of *Henry* the fourth in the Kings Bench, Rot. 12. this adjudged Treason. This denying the title with motives though but implyedly of Action against it, adjudged Treason, this is a compassing the Kings death.

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How this was a compaſsing the Kings death, is declared in the reaſons of the judgement; That the words were ſpoken with an intent to withdraw the affections of the people from the King, and to excite them againſt the King, that in the end they might riſe up againſt him *in mortem & deſtructionem* of the King.

My Lords, in this Judgement and others which I ſhall cite to your Lordſhips, It appeares that it is a compaſsing the Kings death by words, to indeavour to draw the peoples hearts from the King, to ſet diſcord betweene the King and them, whereby the people ſhould leave the King, ſhould riſe up againſt him to the death and deſtruction of the King.

The caſes that I ſhall cite, prove not onely that this is Treaſon, but what is ſufficient evidence to make this good.

Upon a Commiſsion held the 18. yeere of *Edw.* 4. in *Kent*, before the *Marqueſſe of Dorſet* and others, an Inditement was preferred againſt *John Amater* of High-Treaſon, in the forme before mentioned, for words which are entred in the enditement *ſub hac forma*, That he had beene ſervant to the Earle of *Warwicke*, that though he were dead, the Earle of *Oxford* was alive, and ſhould have the government of part of the Countrey, That *Edward* whom you call King of *England*, was a falſe man, and had by art and ſubtelty ſtaine the Earle of *Warwicke* and the Duke of *Clarence* his brother, without any cauſe, who before had beene both of them attainted of High-Treaſon.

My Lords, this Inditement was returned into the Kings Bench in *Trinity* Tearme in the eighteenth yeere of *Edward* the fourth, and in *Eaſter* Tearme in the two and twentieth yeere of *Edward* the fourth he was outlawed, by the ſtay of the outlawry, ſo long it ſeemes the Judges had well adviſed before whether it were Treaſon or not.

At the ſame Seſsion *Thomas Heber* was indited of Treaſon for theſe words, *That the laſt Parliament was the moſt ſimple and inſufficient Parliament that ever had beene in England. That the King was gone to live in* Kent, *becauſe that for the preſent he had not the love of the Citizens of* London, *nor ſhould he have it for the future. That if the Biſhop of* Bath *and* Wels *were dead, the Archbiſhop of*

Canterbury, *being Cardinall of* England, *would immediately loſe his head.* This inditement was returned into the Kings Bench in Trinity Tearme in the eighteenth yeere of *Edward* the fourth. Afterwards there came a Privy Seale to the Judges to reſpit the proceedings, which as it ſhould ſeeme was to the intent the Judges might adviſe of the Caſe, for afterwards he is outlawed of high-Treaſon upon this inditement.

Theſe words were thought ſufficient evidence to prove theſe ſeverall Inditements, That they were ſpoken to withdraw the peoples affection from the King, to excite them againſt him, to cauſe riſings againſt him by the people, *in mortem & deſtructionem* of the King.

Your Lordſhips are pleaſed to conſider that in all theſe Caſes, the Treaſon was for words onely, words by private perſons, and in a more private manner, but once ſpoken and no more, onely amongſt the people, to excite them againſt the King.

My Lords, here are words, Counſels more than words, and actions too, not onely to diſ-affect the people to the King, but the King likewiſe towards the people; not once but often, not in private, but in places moſt publique, not by a private perſon, but by a Counſellor of State, a Lord Lieutenant, a Lord Preſident, a Lord Deputy of *Ireland.*

1 To his Majeſty, *That the Parliament had denied to ſupply him*; a ſlander upon all the Commons of *England* in their affections to the King and Kingdome, in refuſing to yeeld timely ſupply for the neceſsities of King and Kingdome.

2 From thence, *That the King was looſe and abſolved from rules of government, and was to doe every thing that power would admit.* My Lords, more cannot be ſaid, they cannot be aggravated, whatever I ſhould ſay would be in diminution.

3 Thence, *You have an Army in Ireland you may imploy to reduce this Kingdome.*

To counſell a King not to love his people, is very unnaturall, it goes higher, to hate them, to malice them in his heart; the higheſt expreſsions of malice, to deſtroy them by warre: Theſe coales they were caſt upon his Majeſty, they were blowne, they could not kindle in that breſt.

Thence

Thence, my Lords, having done the utmoſt to the King, hee goes to the people: At *York* the Country being met together for Juſtice, at the open Aſsizes upon the Bench, he tels them, ſpeaking of the Juſtices of the Peace, *that they were all for Law, nothing but Law, but they ſhould find that the Kings little finger ſhould be heavier than the loines of the Law.*

They ſhall find, my Lords, who ſpeakes this to the people, a Privie Counſellour? this muſt be either to traduce his Majeſty to the people as ſpoken from him, or from himſelfe, who was Lord Lieutenant of the County and Preſident, intruſted with the forces and Juſtice of thoſe parts, that he would imploy both this way; add, my Lords, to his words there the exerciſing of an arbitrary and vaſt Juriſdiction before he had ſo much as Inſtructions or colour of warrant.

Thence we carry him into *Ireland*, there he repreſented by his place the ſacred perſon of his Majeſty.

1 There at *Dublyn*, the principall City of that Kingdome, whither the Subjects of that Countrey came for Juſtice, in an Aſſembly of the Peeres and others of greateſt ranke, upon occaſion of a ſpeech of the Recorder of that City touching their Franchiſes and Legall Rights, he tels them, that *Ireland was a conquered Nation, and that the King might doe with them what he pleaſed.*

2 Not long after, in the Parliament 10. *Car.* in the Chaire of State, in full Parliament, againe, That *they were a conquered Nation, and that they were to expect Lawes as from a Conquerour*; before, *The King might doe with them what he would*; now, *They were to expect it, that he would put this power of a Conquerour in execution.* The Circumſtances are very conſiderable, in full Parliament, from himſelfe in *Cathedra*, to the repreſentative body of the whole Kingdome.

The occaſion adds much, when they deſire the benefit of the Lawes, and that their Cauſes and Suites might be determined according to Law, and not by himſelfe, at his will and pleaſure upon paper Petitions.

3 Upon like occaſion of preſsing the Lawes and Statutes, That hee would make an *Act of Counſell board in that Kingdome as*

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binding as an Act of Parliament.

4. He made his words good by his actions, assumed and exercised a boundlesse and lawlesse Jurisdiction over the lives, persons, and estates of his Majesties Subjects, procured judgement of death against a Peere of that Realme, commanded another to be hanged, this was accordingly executed, both in times of high Peace, without any processe or colour of Law.

5. By force for a long time he stifled the yarne and flax of the Subjects, to the starving and undoing of many thousands, besides the Tobacco businesse, and many Monopolies and unlawfull Taxes, forced a new Oath not to dispute his Majesties royall commands, determined mens estates at his owne will and pleasure upon paper Petitions to himselfe, forced Obedience to these, not onely by Fines and Imprisonment, but likewise by the Army, sessed Souldiers upon the refusers in a hostile manner.

6. Was an Incendiary of the warre betweene the two Kingdomes of *England* and *Scotland*.

My Lords, we shall leave it to your Lordships Judgements, whether these words, Counsells, and Actions would not have beene a sufficient Evidence to have proved an Inditement drawne up against him, as those before mentioned, and many others are; That they were spoken and done to the intent to withdraw the Kings heart from the people, and the affections of the people from the King, that they might leave the King, and afterwards rise up against him to the destruction of the King; if so, here is a compassing of the Kings death within the words of the Statute of the five and twentieth yeare of *Edward* the third, and that warranted by many former judgements.

The fourth generall Head.

My Lords, I have now done with the three Treasons within the Statute of the five and twentieth of *Edward* the third. I proceed to the fourth upon the Statute of the eighteenth yeare of *Henry* the sixt, Chapter the third in *Ireland*; I shall make bold to read the words to your Lordships,

That no Lord, nor any other of what condition soever he be, shall bring or lead heblers, kerves, or hooded men, nor any other people, on horses to ride on horseback or on foot upon the Kings Subjects without their good wills and consent, but upon their owne costs, and without

hurt

hurt doing to the Commons, and if any ſo doe he ſhall be judged a Traitor.

1. The Argument that hath been made concerning the Perſon, That it extends not to the King, and therefore not to him, weighes nothing with your Lordſhips, *Rex non habet in regno parem*, from the greatneſſe of his office to argue himſelfe into the ſame impoſſibility with his ſacred Majeſty of being uncapable of High-Treaſon, it's an Offence, no reaſon; The words in the Statute, *No Lord nor any other of what condition ſoever he be*, includes every Subject.

In *Trinity* Terme in the three and thirtieth yeare of *Henry* the eight, in the Kings Bench; *Leonard* Lord *Gray*, having immediately before been Lord Deputy of *Ireland*; is attainted of High-Treaſon, and judgement given againſt him for letting divers Rebels out of the Caſtle of *Dublin*, and diſcharging Iriſh hoſtages and pledges that had been given for ſecuring the Peace, for not puniſhing one that ſaid the King was an Heretique. I have read the whole Record, ther's not one thing laid to his charge but was done by him as Lord Leivtenant: Hee had the ſame Plea with my Lord of *Strafford*, That theſe things were no adhering to the Kings Enemies, but were done for reaſons of State, That he was not within thoſe words of the Statute of the five and twentieth yeare of *Edward* the third, himſelfe being Lord Lievtenant there, they coſt his life.

Obj. 2. It hath been ſaid, That the Souldiers, ſeſſed upon the Subjects by him, were not ſuch perſons as are intended by that Statute, *Hublers, Kerves, and hoodedmen*, theſe raſcall people.

Anſw. My Lords, they were the names given to the Souldiary of thoſe times, Hoblers horſemen, the other the foot, but the words of the Statute goe further, *Nor any other people, neither horſe nor foot*, his Lordſhip ſeſſed upon them both horſe and foot.

Object. The Statute extends only to them that leade or bring, *Sacvill* led them, my Lord onely gave the warrant.

Anſw. To that I ſhall ſay onely thus, *plus peccat author quam actor*, by the rule of Law, *agentes & conſentientes pari plectuntur pœnâ*, if conſent, much more a command to doe it, makes the commander a Traitor. If there bee any Treaſon within

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this Statute, my Lord of *Strafford* is guilty.

It hath been therefore ſaid, That this Statute like *Goliah's* ſword hath been wrapt up in a cloth and laid behind the doore, that it hath never been put in execution.

Anſw. My Lords, if the Cleark of the Crowne in *Ireland* had certified your Lordſhips that upon ſearch of the Judgements of Attainders in *Ireland*, he could not finde that any man had bin attainted upon this Statute, your Lordſhips had had ſome ground to beleeve it, yet its onely my Lord of *Straffords* affirmation: Beſides your Lordſhips know that an Act of Parliament binds untill it be repealed.

It hath been therefore ſaid, that this Statute is repealed by the ſtatutes of the eighth yeere of *Edward* the fourth, the firſt Chapter, and of the tenth yeere of *Henry* the ſeventh, the two and twentieth Chapter, becauſe by theſe two ſtatutes, the Engliſh ſtatutes are brought into *Ireland*.

The Argument, (if I miſtook it not,) ſtood thus; That the ſtatute of the firſt of *Henry* the fourth, the 10. Chapter, ſaith, that in no time to come, Treaſon ſhall be adjudged otherwiſe, then it was ordained by the Statute of the 25. yeere of *Edward* the third, That the treaſon mentioned in the 18 yeere of *Henry* the ſixt in the Iriſh ſtatute is not contained in the ſtatute of the 25 yeere of *Edward* the 3. and therefore being contrary to the ſtatute of the firſt of *Henry* the fourth, it muſt needs be void.

My Lords, the difference of the times wherein the ſtatute of the firſt yeere of *Henry* the fourth, and that of the 18 yeere of *Henry* the ſixt were made, cleares the Point, as is humbly conceived; that of *Henry* the ſixt was made fourty yeares after the other.

The ſtatute of the eighth yeare of *Edward* the fourth, and the tenth of *Henery* the ſeventh, bringing in the Engliſh Statutes in order and ſeries of time, as they were made one after another (as afterwards is proved they did) it cannot be that the ſtatute of the firſt yeere of *Henry* the fourth made fourty yeere before, ſhould repeale or make void the ſtatute of the 18. *H.* 6. made ſo long after. The rule of Law is that *Leges poſteriores priores abrogant*

abrogant, that latter lawes repeale former, but by this construction a former Law should repeale and make voide a *Non ens*, a statute that then was not.

If this were Law, then all the statutes that made any new treason after the first yeere of *Henry* the fourth, were voide in the very fabricke, and at the time when they were made; hence likewise it would follow, that the Parliament, now upon what occasion soever, hath no power to make any thing treason not declared to be so in the statute of the five and twentieth yeere of *Edward* the third; This your Lordshippes easily see would make much for my Lord of *Straffords* advantage; but why the Law should be, so your Lordshippes as yet have onely heard an affirmation of it, no reason.

But some touch was given that this statute of the tenth yeere *Henry* the seventh, in words makes all the Irish statutes voide, which are contrary to the English. The Answer to this, is a deniall that there are any such words in the statute: This statute declares, that the English statutes shall be effectuall and confirmed in *Ireland*, and that all statutes, before time, made to the contrary shall bee revoked; this repeales onely the Irish statutes of the tenth yeere of *Henry* the fourth, and the nine and twentieth yeere of *Henery* the sixt, which say that the English statutes shall not be in force in *Ireland*, unlesse particularly received in Parliament, It makes all the Irish statutes voide, which say that the English statutes shall not be in force there.

It is usuall when a Statute saith, that such a thing shall bee done or not done, to adde further that all Statutes to the contrary shall be voide.

No likeli-hood that this Statute intended to take away any Statute of Treason; When but in the Chapter next before this, Murder there is made Treason, as if done upon the Kings Person.

That this Statute of the eighteenth yeare of *Henry* the sixt remaines on foot and not repealed either by the Statute of the eighth yeere of *Edward* the fourth, or this of the tenth yeere of *Henry* the seventh, appeares expressely by two severall Acts of Parliament made at the same Parliament of the tenth

yeere of *Henry* the ſeventh.

By an Act of Parliament in *Henry* the ſixt time, in *Ireland*, it was made Treaſon for any man to procure a privie Seale, or any other Command whatſoever, for apprehending any perſon in *Ireland* for Treaſon done without that Kingdome, and to put any ſuch Commaad in execution; Divers had beene attainted of Treaſon for executing ſuch Commands: Heere is a Treaſon ſo made by Act of Parliament in *Henry* the ſixt time: In the third Chapter of this Parliament of the tenth of *Henry* the ſeventh, an Act is paſſed for no other end then to repeale this Statute of *Henry* the ſixth, of Treaſon.

If this Statute of *Henry* the ſixt of Treaſon, had beene formerly repealed by the Statute of 8. *Edward* 4. or then by the two and twentieth Chapter of this Parliament of 10. *Henry* 7. by bringing in the Engliſh Statutes, the Law-makers were much miſtaken, now to make a particular Act of Parliament to repeale it, it being likewiſe ſo unreaſonable an Act as it was.

In the eighth Chapter of this Parliament, of the tenth of *Henry* the ſeaventh; It's enacted, That the Statutes of *Killkenny* and all other Statutes made in *Ireland* (two onely excepted, whereof this of the eighteenth of *Henry* the ſixt is none) for the Common-weale ſhall be enquired off and executed. My Lord of *Strafford* ſaith, that the bringing in of the *Engliſh* Statutes, hath repealed this Statute of the eighteenth yeere of *Henry* the ſixt, the Act of Parliament made the ſame time ſaith no; it ſaith that all the Iriſh Statutes, excepting two, whereof this is none, ſhall ſtill be in force.

Object. Oh! But how ever it was in 10. *H.* 7. yet it appeares by Judgement in Parliament afterwards, That this Statute of the eighteenth yeere of *Henry* the ſixth is repealed, and that is by the Parliament of the eleventh yeere of Queene *Elizabeth*, the ſeventh Chapter, *That by this Parliament it is enacted, that if any man without licenſe from the Lord Deputie, lay any Souldiers upon the Kings Subjects, if hee bee a Peere of the Realme, hee ſhall forfeit one hundred*

dred pounds, if under the degree of a Peere, 100 markes. This Statute as is alleadged, declares the penalty of laying Souldiers upon the Subjects, to bee onely a hundred pounds; and therefore its not Treason.

Answer, My Lords, if the offence for which this penaltie of one hundred pounds, is laid upon the offender, bee for laying Souldiers, or leading them to doe any acts offensive or invasive upon the Kings people, The Argument hath some force; but that the offence is not for laying Souldiers upon the true Subjects; that this is not the offence intended in the Statute, will appeare to your Lordships, *Ex absurdo*, from the words of it.

The words are, *That if any man shall assemble the people of the County together to conclude of peace or warre, or shall carry those people to doe any Acts offensive or invasive, then hee shall forfeit one hundred pounds*; If concluding of warre and carrying the people to Acts invasive, be against the Kings Subjects, this is high Treason within the words of the Statute of the five and twentieth yeere of *Edward* the third; For if any Subject shall assemble the people and conclude a warre, and accordingly shall lead them to invade the Subject, this is a levying of warre within the word of that Statute; and then the Statutes of the five and twentieth yeer of *Edward* the third; the first of *Henry* the fourth; and the first of Queene *Mary* which the Earle of *Strafford* in his Answer desires to be tryed by, are as well repealed in this point, as the Statute of the eighteenth yeere of *Henry* the sixth, he might then without feare of Treason have done what he pleased with the Irish Army; for all the Statutes of levying warre, by this Statute of the eleventh Yeere of Queene ELIZABETH were taken out of his way.

In *Ireland* a Subject gathers forces, concludes a warre against the Kings people, actually invades them; bloodshedde, burning of houses, Depredations ensue, two of those, that is, murder and burning of houses are Treason, and there the other felony; by this construction the punish-

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ment of Treaſon and ſelony is turned onely into a fine of one hundred pounds; from loſſe of life, lands, and all his goods, onely to loſſe of part of his goods.

3 The third abſurdity, a warre is concluded, three ſeverall Inrodes are made upon the Subject; in the firſt, a hundred pound Damage; in the ſecond, five thouſand pound Damage; in the third, tenne thouſand pound Damage is done to the Subjects; the penalty for the laſt inrode is no more than for the firſt, onely one hundred pounds. This ſtatute by this conſtruction tells any man how to get his living without long labour.

Two parts of the hundred pounds is given to the King, a third part to the informer; here's no dammage to the Subject that is robbed and deſtroyed.

My Lords, the Statute will free it ſelfe and the makers of it from theſe abſurdities.

The meaning of this Statute is, *That if any Captaine ſhall of his owne head conclude of peace or warre againſt the Kings Enemies or Rebels*, or ſhall upon his owne head invade them, without warrant from the King, or the Lord Deputie of *Ireland*, that then he ſhall forfeit a hundred pounds.

The offence is not for laying of Souldiers upon the Kings people, but making of warre againſt the Iriſh Rebells without warrant; the offence is not in the matter, but in the manner, for doing a thing lawfull, but without miſsion.

1 This will appeare by the generall ſcope of the Statute, all the parts being put together.

2 By particular clauſes in the Statute. And,

3 By the Condition of that Kingdome at the time of the making of that Statute.

For the firſt, The preamble recites that in time of Declination of Juſtice under pretext of defending the Countrey and themſelves, divers great men arrogated to themſelves Regall authority under the names of Captaines, that they acquired to themſelves that

government which belonged to the Crowne, for preventing this Its enacted, that no man dwelling within the Shire grounds, shall thenceforth assume or take upon himselfe the authority or name of a Captain within those Shire grounds, without Letters Pattents from the Crowne, nor shall under colour of his Captaineship make any demand of the people of any exaction, nor as a Captaine assemble the people the shire grounds; nor as a Captaine shall lead those people to do any acts offensive or invasive without warrant under the great Seale of *England* or of the Lord Deputy upon penalty that if he doe any thing contrary to that act, then the Offendor shall forfeit a hundred pounds.

My Lords, the Rebels had beene out, the Courts of justice scarce sate, for defence of the Countrey, diverse usurped the place of Captaines, concluded of war against the Rebels and invaded them without warrant; invading the Rebels without authority is the crime.

This appeares further by particular clauses in the Statute, 2.
none shall exercise any Captainship within the shire grounds, nor assemble the men of the shire grounds to conclude of warre, or lead them to any invasion.

That that had anciently beene so continued to this time, that is the *Irish* and the *English* pale, they within the shire grounds were within the *English* pale, and *ad fidem & legem Angliæ*; the *Irish* that were without the pale were enemies alwaies either in open act of hostility or upon leagues, and hostages given for securing the peace, and therefore as here in *England*, we had our marches upon the frontiers in *Scotland* and *Wales*, so were their Marches between the *English* and *Irish* pale, where the inhabitants held their Lands by this tenure to defend the Countrey against the *Irish*, as appeares in the close Rols of the Tower in the 20. yeere of *Edward* the third, *membrana* 15. on the backside, and in an *Irish* Parliament held the 42. yeere of *Edward* the 3. Its declared, that the *English* pale was almost destroyed by the *Irish* enemies, and that there was no way to prevent the danger, but onely that the owners reside upon their Lands for defence, and that absence should be a forfeiture, this act of Parliament in a great counsell here was affirmed, as appeares in the close Roll, the 22. yeere of *Edward* the third, *membrana* 20. dorse.

Afterwards as appeares in the Statute of the 28. yeere of *Henry* the 6. in *Ireland*, this hostility continued betweene the *English* marches and the *Irish* enemies, who by reason there

was no difference betweene the *Engliſh* marches and them in their apparell, did daily not being known to the *Engliſh*, deſtroy the *Engliſh* within the pale. Therefore its enacted, that *every Engliſh man ſhall ſhave the haire of his upper lip for diſtinction ſake.* This hoſtility continued, till the 10. yeere of *Henry* the 7. as appeares by the Statute of the tenth of *Henry* the 7, the 17. Chapter; and ſo ſucceſſively downewards, till the making of this very Statute of the 11. yeere of *Q. Eliz.abeth*, as appeares fully in the ninth Chapter.

Nay immediately before, and at the time of the making of this Statute, there was not onely enmity between thoſe of the Shire grounds, that is, the *Engliſh* and *Iriſh* pale, but open War and Acts of hoſtility, as appeares by Hiſtory of no leſſe authority, then that Statute it ſelfe, for in the firſt Chapter of this Statute is the Attainder of *Shane O Neale*, who had made open Warre, was ſlaine in open Warre. Its there declared, that he had gotten by force all the *North* of *Ireland* for an hundred and twenty miles in length, and above a 100. in bredth, that he had maſtered divers places within the *Engliſh* pale; when the flame of this warre by his death immediately before this Statute was ſpent, yet the fire-brands were not all quenched, for the rebellion was continued by *John Fitz Gerard* called the white Knight, and *Thomas Quever ford*, this appeares by the Statute of the 13. yeere of Qu. *Eliz.abeth* in *Ireland*, but two yeeres after this of the eleventh yeere of Qu. *Eliz.abeth*, where they are attainted of high treaſon for levying Warre this eleaventh yeere, wherein this Statute was made.

So that my Lords, immediately before, and at the time of the making of this Statute, there being Warre betweene thoſe of the Shire grounds mentioned in this Statute, and the *Iriſh*, the concluding of Warre and Acts offenſive and invaſive there mentioned can be intended againſt no others, but the *Iriſh* enemies.

Againe the words of the Statute are, no Captaine ſhall aſſemble the people of the Shire grounds to conclude of peace or warre, is it to be preſumed that thoſe of the Shire grounds will conclude of Warre againſt themſelves? nor ſaith the Statute ſhall carry thoſe of the Shire grounds to doe any Acts invaſive; by the conſtruction which is made on the other ſide, they muſt be carried to fight againſt themſelves.

Laſtly the words are, as Captaine none ſhall aſſume the name or authority of a Captaine, or as a Captaine ſhall gather the people together, or as a Captaine lead them. The offence is

not in the matter, but in the manner: If the acts offensive were against the Kings good subjects, those that went under command were punishable, as well as the Commanders, but in respect, the Souldiers knew the service to be good in it selfe being against the enemies, and that it was not for them to dispute the authority of their commanders, the penalty of a 100. pounds is laid onely upon him, that as Captaine shall assume this power without warrant, the people commanded are not within the Statute.

My Lords, the logicke whereupon this argument hath beene framed stands thus, because the Statute of the eleventh yeere of Qu. *Elizabeth* inflicts a penalty of a 100. pound, and no more upon any man, that as a Captaine without warrant, and upon his owne head shall conclude of, or make Warre against the Kings enemies; therefore the Statute of the 18. yeere of *Henry* the sixth, is repealed, which makes it treason to lay Souldiers upon, or to levie warre against the Kings good people.

But my Lords observation hath beene made upon other words of this statute, that is, that without licence of the Deputy, these things cannot be done: This shewes, that the Deputy is within none of these Statutes.

My Lords, this Argument stands upon the same reason with the former, because hee hath the ordering of the Army of *Ireland* for the defence of the people, and may give warrant to the Officers of the Army upon eminent occasions of invasion to resist or prosecute the enemy, because of the danger that else might ensue forthwith by staying for a warrant from his Majesty out of *England*; Therefore it is no treason in the Deputy to imploy the Army in *Ireland* whensoever he pleaseth for the subversion of the Kings good people, and of the lawes.

My Lords, the Statute of the tenth yeere of *Henry* the 7. the 17. Chapter touched upon for this purpose, cleares the businesse in both points, for there it is declared, that none ought to make warre upon the *Irish* rebels and enemies without warrant from the Lieutenant, the forfeiture a 100. pounds as here the Statute is the same with this, and might as well have beene cited for repealing the Statute of the eighteenth yeere of *Henry* the 6. as this of the 11. yeere of Q. *Elizabeth*: but if this had bin insisted upon, it would have expounded the other two cleare against him.

My Lords, it hath been further said, although the statute be in force, and there be a treason within it, yet the Parliament hath no jurisdiction; the treasons are committed in *Ireland*, therefore not triable here. *Obj.*

My Lords, Sir *John Perrot* his predecessors in the 24. yeere of *Answ.*

Q. Elizabeth was tried in the Kings bench for treason done in *Ireland*, when he was Deputy; and *Oruske* in the 33. yeere of Q. *Elizabeth* judged here for treason done in *Ireland*.

Obj. But it will be said, these trials were after the Statute of the 34. yeere of *Henry* the eight, which enacts, that treasons beyond sea may be tried in *England*.

Answ. My Lords, his predecessor my Lord *Gray* was tried and adjudged here in the Kings bench, that was in Trinity tearm in the 33. yeere of *Henry* 8. this was before the making of that Statute.

Obj. To this againe will be said, that it was for treason by the Lawes and Statutes of *England*, but this is not for any thing, thats treason by the Law of *England*, but by an *Irish* Statute.

So that the question is onely whether your Lordships in Parliament here have cognisance of an offence made treason by an *Irish* Statute in the ordinary way of judicature without bill, for so is the present question.

For the clearing of this, I shall propound two things to your Lordships consideration:

1. Whether the rule for expounding the *Irish* Statutes and customes be one, and the same in *England* as in *Ireland*.

2. That being admitted whether the Parliaments in *England* have cognizance or jurisdiction of things there done in respect of the place, because the Kings writ runnes not there.

For the first, if in respect of the place, the Parliament here hath cognizance there; And secondly, if the rules for expounding the *Irish* Statutes and Customes be the same here as there, this exception as I humbly conceive, must fall away.

In *England* there is the common law, the Statutes, the acts of Parliament and customes peculiar to certaine places differing from the common law, if any question arise concerning either a custome or an act of Parliament, the common law of *England*; the first, the primitive and the generall law, that's the rule and expositour of them and of their severall extents, it is so here, it is so in *Ireland*, the common law of *England* is the common law of *Ireland* likewise; the same here and there in all the parts of it.

It was introduced into *Ireland* by King *John*, and afterwards by K. *Harry* the 3. by act of Parliament held in *England*, as appeares by the pattent Rolls of the 30. yeare of K. *Henry* the 3. the first *membrana*. The words are, *Quia pro communi utilitate terræ Hiberniæ, & unitate terrarum Regis, Rex vult, & de communi consilio Regis provisum est, quod omnes leges & consuetudines quæ in regno Angliæ tenentur, in Hibernia teneantur. & eadem terra eisdem legibus subjaceat, & per easdem regatur, sicut Dominus* Johannes *Rex cum ultimò esset in Hibernia, statuit, & fieri mandavit. Quia &c. Rex vult quod*

omnia

omnia brevia de communi lure quæ currunt in Angl'ia, similiter currunt in Hibernia sub novo sigillo Regis, mandatum est Archiepiscopis, &c. quod pro pace & tranquillitate ejusdem terræ, per easdem leges eas regi & deduci permittant, & eas in omnibus sequantur. In cujus, &c. Teste Rege, apud Woodstock, decimo nono die Septembris.

Here's an union of both Kingdomes, and that by act of Parliament, and the same Lawes to be used here as there, in *omnibus*.

My Lords, That nothing might be left here for an exception, that is, that in treasons, felonies, and other capitall offences concerning life, the Irish lawes are not the same as here. Therefore it is enacted in a Parliament held in England in the 14. yeere of *Edward* the second (it is not in print neither, but is in the Parliament booke) That the Lawes concerning life and member shall be the same in Ireland as in England.

And that no exception might yet remaine, in a Parliament held in England, the fifth yeere of *Edw.* the 3. It is enacted, *quod una & eadem Lex fiat tã Hibernicis quam Anglicis.* This act is enrolled in the Patent rolls of the fifth yeere of *Edw.* the 3. *part.* 1. *membr.* 25.

The Irish therefore receiving their Lawes from hence, they send their Students at Law to the Innes of Courts in England, where they receive their degree; and of them, and of the common Lawyers of this kingdome are the Judges made.

The pettiõs have been many from Ireland, to send frõ hence some Judges more learned in the Laws then those they had there.

It hath beene frequent in cases of difficulty there, to send sometimes to the Parliament here, sometimes to the K. by advice from the Judges here, to send them resolutions of their doubts: Amongst many I'll cite your Lordships one; one, because it is in a case of treason upon an Irish stat. & therefore full to this point.

By a Statute there made in the 5. yeere of *Ed.* the fourth, there is provision made for such as upon suggestions are committed to prison for Treason, that the party committed, if he can procure 24. Compurgators, shall be bailed, and let out of prison.

Two Citizens of Dublin were by a grand Jury presented to have committed treason; They desired the benefit of this Statute, that they might be let out of prison upon tender of their Compurgators. The words of the Statute of the 5. yeere of Ed. the 4. in Ireland being obscure, the Judges there not being satisfied what to doe, sent the case over to the Q. desired the opinion of the Judges here; which was done accordingly. The Judges here sent over their opinion, which I have out of the Book of Justice *Anderson*, one of the Judges consulted with all. The Judges here delivered opinion upon an Irish Statute in case of Treason.

If it bee objected, That in this case the Judges here did not

judge upon the party; their opinions were only *ad informandu conscientiam* of the Judges in Ireland; that the judgement belonged to the Judges there.

My Lords, with submission, this and the other Authorities prove that for which they were cited; that is, That no absurdity, no failer of Justice would ensue, if this great Judicatory should judge of Treason so made by an Irish Statute.

The common Law, the rule of Judging upon an Irish Stat. the pleas of the Crowne for things of life & death, are the same here and there. This is all that hath yet beene offered.

For the second point, That England hath no power of Judicature for things done in Ireland; My Lords, the constant practice of all ages proves the contrary.

Writs of errour in Pleas of the Crowne as well as in civill causes, have in all Kings reignes been brought here, even in the inferiour Courts of Westm. Hall, upon judgments given in the courts of Ireland: The practice is so frequent, & so well known, as that I shall cite none of them to your Lordsh ps: no president will (I beleeve) be produced to your Lordships, that ever the case was remanded back againe into Ireland, because the question rose upon an Irish Statute or custome.

Object. But it will bee said, That writs of errour are only upon a failer of justice in Ireland; and that suits cannot originally be commenced here for things done in Ireland, because the Kings writ

Answ. runs not in Ireland.

This might be a good plea in the Kings Bench, and inferiour Courts at Westminster Hall; the question is, whether it be so in Parliament. The Kings writ runs not within the County Palatine of Chester and Durham, nor within the five Ports; neither did it in Wales before the union in *Henry* the eighth's time; after the Lawes of England were brought into Wales in King *Edward* the first's time, suits were not originally commenced in Westminster Hall, for things done in them, yet this never excluded the Parliament: suits for life, lands, and goods within those jurisdictions are determinable in Parliament, as well as in any other parts of the Realme.

Ireland, as appeares by the Statute of the thirtieth yeere of *Hen.* the third, before mentioned, is united to the Crowne of Engl.

By the Statute of the eight & twenty yeere of *Henry* the 6. in *Ireland*, it is declared in these words; That *Ireland* is the proper Dominion of England, and united to the Crowne of England, which Crowne of England is of it selfe, and by it selfe, fully, wholly, & entirely endowed with all power & authority sufficient to yeeld to the subjects of the same full and plenary remedy

in

in all debates and ſuits whatſoever.

By the Statute of the 33. yeere of *Henry* the eighth, the firſt Chapter, when the Kings of England firſt aſſumed the title of King of *Ireland*, it is there enacted, That *Ireland* ſtill is to bee held as a Crowne annexed &unite to the Crowne of England.

So that by the ſame reaſon, from this, that the Kings writ runs not in *Ireland*, it might aſwell be held, that the Parliament cannot originally hold plea of things done within the County Palatine of Cheſter and Durham, nor within the five Ports and Wales; *Ireland* is part of the Realme of England, as appeares by thoſe Statutes, as well as any of them.

This is made good by conſtant practice. In all the Parliament rolls, from the firſt to the laſt, there are receivers and tryers of petitions appointed for *Ireland*. For the Iriſh to come ſo farre with their petitions for juſtice, and the Parliament not to have cognizance, when from time to time they had in the beginning of the Parliament appointed receivers and tryers of them, is a thing not to be preſumed.

An appeale in *Ireland* brought by *William* Lord *Veſcye* againſt *Iohn Fitz Thomas* for treaſonable words there ſpoken, before any Judgement given in the caſe there, was removed into the Parliament in England, and there the defendant acquitted, as appeares in the Parliament pleas of the two and twentieth yeere of *Edward* the firſt.

The ſuits for lands, offices, and goods, originally begun here, are many; and if queſtion grew upon matter in fact, a Jury uſually ordered to try it, and the verdict returned into Parliament, as in the caſe of one *Balliben*, in the Parliament of the five and thirtieth yeere of *Edward* the firſt. If doubt aroſe upon a matter tryable by Record, a writ went to the Officers in whoſe cuſtody the Record remained, to certifie the Record, as was in the caſe of *Robert Bagot* the ſame Parliament of the five and thirtieth yeere of *Edward* the firſt, where the writs went to the Treaſurer and Barons of the Exchequer.

Sometimes they gave judgement here in Parliament, and commanded the Judges there in *Ireland* to doe execution, as in the great caſe of Partition betweene the copartceners of the Earle Marſhall, in the Parliament of the 33. yeere of *Edward* the firſt where the writ was awarded to the Treaſurer of Ireland.

My Lords, The Lawes of Ireland were introduced by the Parliaments of England, as appeares by three Acts of Parliament before cited.

It is of higher juriſdiction *dare Leges*, then to judge by them.

The Parliaments of England doe binde in Ireland, if Ireland be particularly mentioned, as is reſolved in the Booke caſe of

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the first yeere of *Henr* the seventh, *Coke*: seventh Report, *Calvins* case, and by the Judges in Trinity Terme, in the three and thirtieth yeere of Q. *Elizabeth*: The Statute of the eighth yeere of *Edward* the fourth, the first Chapter in Ireland recites, that it was doubted amongst the Judges, whether all the English Statutes, though not naming Ireland, were in force there; if named, no doubt.

From King *Henry* the third his time downward to the eigh h yeere of Q: *Elizabeth* (by which Statute it is made felony to carry sheepe from Ireland beyond seas) in almost all these Kings reignes there be Statutes made concerning Ireland.

The exercising of the *Legislative* power there over their lives and estates, is higher then of the Judiciall in question. Vntill the nine and twentieth yeere of *Edward* the third, erroneous judgements given in Ireland, were determinable no where but in England; no, not in the Parliaments of Ireland, as it appeares in the close rolls in the Tower, in the nine and twentieth yeere of *Edward* the third, *memb.* 12. Power to examine and reverse erroneous judgements in the Parliaments of Ireland is granted from hence; Writs of errour lie in the Parliament here upon erroneous judgements after that time given in the Parliaments of Ireland, as appeares in the Parliament rolls of the eighth yeere of *H.* the sixth, *m.* 70. in the case of the Prior of Lenthan. It is true, the case is not determined there, for it's the last thing that came into the Parliament, and could not bee determined for want of time; but no exception at all is taken to the jurisdiction.

The Acts of Parliament made in Ireland have been confirmed in the Parliaments of England, as appeares by the close rolls in the Tower, in the 42. yeere of *Edw.* the 3. *membr.* 20 *dorso*; where the Parliament in Ireland, for the preservation of the Countrey from the Irish, who had almost destroyed it, made an Act, that all the land-owners, that were English should reside upon their lands, or else they were to be forfeited: this was here confirmed.

In the Parliament of the 4. yeere of *H.* the 5. *chap.* 6. Acts of Parliament in Ireland are confirmed, and some privileges of the Peeres in the Parliaments there are regulated.

Power to repeale Irish Statutes, power to confirme them, cannot be by the Parliament here, if it hath not cognizance of their Parliaments, unlesse it be said, That the Parliament may doe it knowes not what.

Garnesey and Jersey are under the Kings subjection, but are not parcels of the Crown of England, but of the dutchy of Normandy; they are not governed by the lawes of England, as Ireland is; and yet Parliaments in England have usually held plea

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of, and determined all cauſes concerning lands or goods. In the Parliament of 33. *E.* 1. there be *placita de Inſula Ierneſey*; and ſo in the Parliament 14. *E.* 2. and ſo for Normandy and Gaſcoyne; and always as long as any part of France was in ſubjection to the Crown of England, there were at the beginning of Parliaments, receivers and tryers of petitions for thoſe parts appointed.

I beleeve your Lordſhips will have no caſes ſhewed of any plea to the juriſdiction of the Parliaments of England, in any thing done in any parts whereſoever in ſubjection to the Crown of England.

The laſt thing I ſhall offer to your Lordſhips is the caſe of 19. *El.* in my Lord *Dyer* 306. and Iudge *Comptons* book of the juriſdiction of Courts, *fol.* 23. The opinion of both theſe books is, that an Iriſh Peere is not triable here. It's true, a Scottiſh or French Nobleman is triable here as a common perſon; the Law takes no notice of their Nobility, becauſe thoſe Countryes are not governed by the Lawes of England; but Ireland being governed by the ſame Laws the Peeres there are triable according to the Law of England, onely *per pares*.

By the ſame reaſon the Earle of Strafford, not being a peere of Ireland, is not triable by the Peeres of Ireland; ſo that if he be not triable here, he is triable no where.

My Lords, In caſe there be a Treaſon and a Traitor within the Statute, and that he be not triable here for it in the ordinary way of judicatory, if that juriſdiction failes, this by way of Bill doth not; Attainders of Treaſon in Parliament are as legall, as uſuall by Act of Parliament as by Iudgement.

I have now done with the Statutes of 25. *E.* 3. and 18. *H.* 6. My Lord of Strafford hath offended againſt both the Kingdomes, and is guilty of high Treaſon by the Lawes of both.

5 My Lords, In the fifth place I am come to the Treaſons at the common Law, the endevouring to ſubvert the fundamentall Lawes and governement of the Kingdome, and to introduce an arbitrary and tyrannycall governement.

In this I ſhall not at all labour to prove, that the endevouring by words, counſells and actions to ſubvert the Lawes, is treaſon at the common Law, if there be any common Law treaſons at all left? nothing treaſon, if this not, to make a Kingdome no Kingdome: take the politie and governement away, England's but a peece of earth, wherein ſo many men have their commorancy and abode, without rancks or diſtinction of men, without property in any thing further

then poſſeſſion, no Law to puniſh the murdering or robbing one another.

That of 33. *H.* 8. of introducing the Imperiall Law, ſticks not with your Lordſhips: It was in caſe of an appeal to Rome, theſe appeals in caſes of marriages, and other cauſes counted Eccleſiaſticall, had beene frequent, had in moſt Kings reigns been tollerated; ſom in times of popery put a conſcience upon them, the Statutes had limitted the penalty to a *Premunire* onely: Neither was that a total ſubverſion, only an appeal from the Eccleſiaſtical Court here in a ſingle cauſe to the Court at Rome; and if treaſon or not, that caſe proves not; a treaſon may be puniſhed as a felony, a felony as a treſpaſſe, if his Majeſty ſo pleaſe; the greater includes the leſſer: In the caſe of *Premunire* in the Iriſh reports, that which is there declared to be treaſon, proceeded upon onely as a *Premunire*.

The thing moſt conſiderable in this, is whether the treaſons at common Law be taken away by the Stat. of 25. *E.* 3. 1. *H.* 4. or 1. *Q. M.* or any of them.

My Lords, to ſay they be taken away by the Stat. of 25. *E.* 3. is to ſpeake againſt the direct words and ſcope of that Statute.

In it there's this clauſe, *That becauſe many other like caſes of treaſon might fall out which are not there declared, therefore it is enacted, That if any ſuch caſe come before the Iudges, they ſhall not proceed to Iudgement till the caſe be declared in Parliament, whether it ought to be adjudged treaſon, or not.*

Theſe words, and the whole ſcope of that Statute ſhewes, that it was not the meaning to take away any treaſons that were ſo before, but only to regulate the juriſdiction and manner of triall. Thoſe that were ſingle & certain Acts, as conſpiring the Kings death, levying war, counterfeiting the money, or great Seal, killing a Iudge, theſe are left to the ordinary Courts of Juſtice the others not depending upon ſingle Acts, but upon conſtructions and neceſſary inferences, they thought it unfit to give inferior Courts ſo great a latitude here, as too dangerus to the ſubject, thoſe they ſtrained to Parliaments.

This Statute was the ſecurity of the ſubject, made with ſuch wiſdome as all the ſucceeding ages have approved it: It hath often paſſed through the fire, but, like gold, hath loſt little or nothing.

The Statute of 1. *H.* 4. *cap.* 10. is in theſe words, *Whereas in the Parliament held the* 21 *yeare of* Richard *the* 2. *divers pains of treaſons were ordained, inſomuch, that no man did know how to behave himſelfe, to doe, ſay, or ſpeake, It is accorded, that in no time to come any treaſon be adjudged otherwiſe then it was ordained by the Statute of* 25. *E.* 3.

It hath beene ſaid, to what end is this Statute made, if it takes not away the common Law treaſons remaining after the Statute of 25. *E.* 3.

There be two maine things which this Statute doth: Firſt it taks away for the future all the treaſons made by any Statute ſince 25. *Ed.* 3. to 1. *Hen.* 4. even to that time: For, in reſpect that by another Act in that Parliament,

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the Statute of 21. *R.*2. was repealed, it will not be denied, but that this Statute repeals more treasons then these of 21. *R.* 2. it repeals all Statute treasons but those in 25. *E.* 3.

Secondly, It not only takes away the Statute treasons, but likewise the declared treasons in Parliam. after 25. *E.*3. as to the future. After declaration in Parliam. the inferior Courts might judge these treasons; for the declaration of a treason in Parliam. after it was made, was sent to the inferior Courts, that *toties quoties* the like case fell out, they might proceed therin: the subject for the future was secured against these; so that this Statute was of great use.

By the very words of it, it still refers all treasons to the provision of 25. *E.* 3. it leaves that entire and upon his old bottome.

The Statute of 1. *Q. M. cap.* 1. saith *That no offences made treason by any Act of Parliament, shall thenceforth be taken or adjudged to be treason, but only as be declared and expressed to be treason by the Statute of* 25. E. 3. *concerning treason, or the declaration of treason and no others: And further provides that no pains of death, penaltie, or forfeiture, in any wise shall ensue for committing any treason, other then such as be in the Statute of* 25. E. 3. *ordained and provided; any Acts of Parliament or any declaration, or matter to the contrary, in any wise notwithstanding.*

By the first part of this Statue, only offences made Treason by Act of Parliament are taken away, the Common Law Treasons are no way touched: The words (*and no others*) refer still to offences made treason by Act of Parliament; they restrain not to the treasons onely particularly mentioned in the Statute of 25. *E.*3. but leave that Statute entire as to the Common-law treason, as appears by the words immediatly foregoing.

By the second part, for the pains and forfeitures of treasons, if it intend only the punishment of treason, or if it intend both treason and punishment, yet all is referred to the provision and ordinance of 25. *E.*3. any Act of Parliament or other declaration or thing notwithstanding.

It saith not, other then such penalties or treasons as are expressed and declared in the Statute of 25. *E.*3. that might perhaps have restrained it to those that are particularly mentioned: No, it refers all treasons to the generall ordination and provision of that Statute, wherein the Common-Law-treasons are expresly kept on foot.

If it be askt what good this Statute doth if it take not away the Common-Law-treasons.

1. It takes away all the treasons made by Act of Parliament, not only since the first of *H.*4. which were many, but all before 1. *H.* 4. even untill 25. *E.*3. by expresse words.

2. By expresse words, it takes away all declared treasons, if any such had been made in Parliam. these for the future are likewise taken away; so that wheras it might have been doubted, whether the Stat. of 1. *H.*4. took away

 any treasons

ſons but thoſe of 21.& 22.*R.*2.this clears it both for treaſons made by Parliament,or declared in Parliament, even to the time of making the ſtatute.

This is of great uſe,of great ſecurity to the ſubject;ſo that as to what ſhal be treaſon, and what not, the ſtatute of 25.*E.*3. remaines entire, and ſo by conſequence the treaſons at the common Law.

Onely,my Lords,it may be doubted whether the manner of the Parliamentary proceedings be not altered by the ſtatute of 1.*H.*4.the 17.*cap.*and more fully in the Parliament roll,numb.144.that is,whether ſince that ſtatute the parliamentary power of declaration of treaſons,whereby the inferiour Courts received juriſdiction; be not taken away and reſtrained onely to Bill, that ſo it might operate no further then to that particular contained in the Bill; that ſo the Parliamentary declarations for after times,ſhould bee kept within the Parliament it ſelfe,& be extended no further.Since 1.*H.*4.we have not found any ſuch declarations made,but all Attainders of treaſon have beene by Bill.

If this be ſo,yet the common Law treaſons ſtill remaining,there is one and the ſame ground of reaſon and equity ſince 1.*H.*4. for paſſing of a Bill of treaſon, as was before for declaring it without Bill.

Herein the *Legislative* power is not uſed againſt my Lord of Strafford in the Bill, its onely the juriſdiction of the Parliament.

But,my Lords,becauſe that either through my miſtaking of the true grounds and reaſons of the Commons,or my not preſſing of them with apt arguments and preſidents of former times,or that perchance your Lorſhips from ſome other reaſons and authorities,more ſwaying with your Lordſhips judgements, then theſe from them,may poſſible be of a contrary and dubious opinion concerning theſe treaſons, either upon the Statutes of 25.*E.*3.and 18. *H.* 6. or at the Common Law.

My Lords,if all theſe five ſhould faile,they have given me further in command to declare to your Lordſhips ſome of their reaſons,why they conceive that in this caſe the meere *Legiſlative* power may be exerciſed.

Their reaſons are taken from theſe three grounds:

1. From the nature and quallity of the offence.
2. From the frame & conſtitution of the Parliament wherin this law is made.
3. From practices and uſages of former times.

The horridneſſe of the offence in endeavouring the overthrowing the Laws and preſent government, hath bin fully opened to your Lorſhips heretofore.

The Parliament is the repreſentation of the whole Kingdome, wherein the King as Head, your Lordſhips as the more noble, and the Commons the other members are knit together in one body politick:This diſſolves the arteries and ligaments that hold the Body together, the Lawes: Hee that takes away the Lawes, takes not away the alegeance of one ſubject alone, but of the whole Kingdome.

It was made Treaſon by the ſtatute of 13. *El.* for her time, to affirme, That the Lawes of the Realme doe not bind the deſcent of the Crowne; no Law, no deſcent at all.

No Laws, no Peerage, no ranks or degrees of men; the ſame condition to all.

It's treaſon to kil a Iudg upon the Bench; this kils not *Iudicem, ſ. d Iudicium*: He that borrowed *Apelles*, and gave bond to returne again *Apelles* the Painter, ſent him home after he had cut off his right hand; his bond was broken, *Apelles* was ſent, but not the Painter. There be twelve men, but no law; there's never a Iudge amongſt them.

Its felony to embezill any one of the judiciall records of the Kingdome; this at once ſweepes them all away, and from all.

Its treaſon to counterfeit a twenty ſhil. peece, here's a counterfeiting of the Law, we can call neither the counterfeit nor true coine our owne.

Its treaſon to counterfeit the great Seale for an acre of land, no property hereby is left to any land at all. Nothing treaſon now, either againſt King or Kingdome, no Law to puniſh it.

My Lords, If the queſtion were asked in Weſtminſter Hall, whether this were a crime puniſhable in Starre-chamber, or in the Kings Bench, by fine or impriſonment, they would ſay, it went higher: If whether felony, they would ſay, That's for an offence onely againſt the life or goods of ſome one or few perſons: It would, I beleeve, be anſwered by the Iudges, as it was by the chief Juſtice *Thirning*, in 21. *R.* 2. That though he could judge the caſe treaſon there before him, yet if he were a Peere in Parliament, he would ſo adjudge it.

My Lords, if it be too big for thoſe Courts, we hope its in the right way here.

2. The ſecond conſideration is from the frame and conſtitution of the Parliament; the Parliament is the great body politicke, it comprehends all from the King to the begger: if ſo, my Lords, as the naturall, ſo thi body, it hath power over it ſelfe, and every one of the members for the preſervation of the whole: Its both the Phyſitian and the patient: if the body be diſtempered, it hath power to open a veine to let out the corrupt blood for curing of it ſelfe; if one member be poyſoned and gangrened, it hath power to cut it off for the preſervation of the reſt.

But, my Lords, it hath been often inculcated, that Law-makers ſhould imitate their ſupreme Law-giver, who commonly warnes before he ſtrikes; the Law was promulged before the judgement of death for gathering of ſtickes; no Law, no tranſgreſſion.

My Lords, to this the rule of Law is, *Fruſtra legis auxilium invocat, qui in legem committit*, from the *lex Talionis*, he that would not have had others to have law, why ſhould hee have any himſelfe? why ſhould not that bee done to him, that himſelfe would have done to others?

Its true, we give law to Hares and Deers, becauſe they be beaſts of Chaſe; It was never accounted either cruelty or foul play to knock Foxes and Wolves on the head, as they can be found; becauſe theſe be beaſts of prey: The Warrener ſets traps for Powlcats and other Vermine, for preſervation of the Warren.

Further, my Lords, moſt dangerous diſeaſes, if not taken in time, they kil: Errors in great things, as War and Marriage, they allow no time for repentance; It would have bin too late to make a law, when there had bin no law.

My Lords, for further anſwer to this obiection, he hath offended a law, a law within, the endeavouring to ſubvert the lawes and politie of the State wherein he lived, which had ſo long, and with ſuch faithfulneſſe protected his Anceſtry, himſelf, and his whole family; *it was not malum, quia prohibitum*, it was *malum in ſe*, againſt the dictates of the dulleſt conſcience, againſt the light of nature; they, not having the law, were a law to themſelves.

Beſides this, he knew a law without, that the Parliament in caſes of this nature had *poteſtatem vitæ & necis*.

Nay, he well knew, that he offended the promulged and ordinary rules of law: Crimes againſt Law have been proved, have been confeſſed, ſo that the queſtion is not *de culpa, ſed de pœna*, what degree of puniſhment thoſe faults deſerve; we muſt differ from him in opinion, that twenty felonies cannot make a treaſon, if it be meant of equality in the uſe of the Legiſlative power: for he that deſerves death for one of theſe felonies alone, deſerves a death more painfull and more ignominious for all together.

Every felony is puniſhed with loſſe of life, lands, and goods; a felony may be aggravated with thoſe circumſtances, as that the Parliament with good reaſon may adde to the circumſtances of puniſhment, as was done in the caſe of *Iohn Hall*, in the Parliament of 1. *H.*4. who for a barbarous murder comitted upon the Duke of Gloceſter, ſtifling him between two featherbeds at Calice, was adiudged to be hanged drawn, and quartered.

Batteries by Law are puniſhable only by fine and ſingle dammages to the party wounded.

In the Parliament held in 1. *H.*4. *cap.*6. one *Savadge* committed a Battery upon one *Chedder*, ſervant to Sir *Iohn Brooke*, a knight of the Parliament for Sommerſetſhire; Its there enacted, that he ſhall pay double dammages, and ſtand convicted if he render not himſelf by ſuch a time: The maner of proceedings quickned, the penalty doubled, the circumſtances were conſidered, it concerned the Common-wealth, it was Battery with breach of priviledge of Parliament.

This made a perpetuall Act, no warning to the firſt offendor; And in the Kings Bench, as appears by the book caſe of 9. *H.*4. the firſt leaf, double dammages were recovered.

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My Lords, in this of the Bill the offence is high and generall, againſt the King and the Common-wealth; againſt all and the beſt of all.

If every Felony be loſſe of life, lands and goods, what is miſuſer of the *Legiſlative* power, by addition of Ignominie in the death and diſpoſall of the lands to the Crowne, the publicke patrimony of the Kingdome.

But it was hoped that your Lordſhips had no more skill in the Art of killing of men, than your worthy Anceſtors.

My Lords this appeal from your ſelves to your Anceſtors we admit of, although we do not admit of that from your Lordſh. to the Peeres of Ireland.

He hath appealed unto them; your Lordſhips will be pleaſed to hear what Judgement they have already given in the Caſe, that is the ſeverall attenders of Treaſon in Parliament, after the Statute of 25. *E.* 3. for treaſons not mentioned, without nor within that Statute, and thoſe upon the firſt offenders warning given.

By the Statute of 25. *E.* 3. its reaſon to levy war againſt the King: *Gomines* and *Weſton* afterwards in Parliament in 1. *R.* 2. num. 38, 39. adiudged traitors for furrendring two ſeuerall Caſtles in France, only out of fear, without any compliance with the Enemy; this not within the Statute of 25. *E.* 3.

My Lords, in 3. *R.* 2. *Iohn Imperiall* that came into England upon letters of ſafe conduct, as an Agent for the ſtate of Genoah, ſitting in the Evening before his door in Breadſtreet, (as the words of the Records are) *paulo ante ignit egium*; *Iohn Kirby* and another Citizen comming that way, caſually *Kirby* trode upon his Toe: it being twilight, this grew to a quarrell, and the Ambaſſador was ſlaine; *Kirby* was indicted of high treaſon, the indictment findes all this, and that it was only done *ſe defendendo*, and without malice. The Judges, it being out of the Stat. of 25 *E.* 3. could not proceede; the Parliam. declared it treaſon, and judgment afterwards of high treaſon, ther's nothing can bring this within the Stat. of 25 *E.* 3. but it concerns the honor of the Nation, that the publick faith ſhould be ſtrictly kept: It might endanger the traffick of the kingdome; they made not a Law firſt, they made the firſt man an example. This is in the Parliament Roll, 3. *R.* 2. *num.* 18. and *Hilary* Terme, 3. *R.* 2. *Rot.* 31. in the Kings Bench, where judgment is given againſt him.

In 11. *R.* 2. *Treſilian*, and ſome others attainted of treaſon for delivering opinions in the ſubverſion of the Law, and ſome others for plotting the like: My Lords, the caſe hath upon another occaſion been opened to your Lordſh. only this is obſervable, That in the Parlia. of the 1. year of *Henry* the third, where all treaſons are again reduced to the Stat. of 25 E. 3. theſe Attainders were by a particular Act confirmed and made good, that the memory therof might be tranſmitted to ſucceeding ages: They ſtand good to this day; the offences there, as here, were the endeavoring the ſubverſion of the lawes.

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My Lords; after 1. *H.* 4. Sir *Iohn Mortimer* being committed to the Tower upon ſuſpition of treaſon, brake priſon, and made an eſcape: This no way within any Statute, or any former Iudgement at common Law; for this, that is, for breaking the priſon onely, and no other cauſe, in the Parliament held the 2. yeer of *H.6.* he was attainted of high treaſon by Bill.

My Lords, poyſoning is onely murder; yet one *Richard Coke* having put poyſon into a pot of potage in the kitchin of the Biſh. of Rocheſter whereof two perſons dyed, hee's attainted of Treaſon, & it was enacted that he ſhould be boyled to death by the ſtatute of 22. *H.*8. *cap.*9.

By the ſtatute of 25. *H.*8. *Elizabeth Barton*, the holy maid of *Kent*, for pretending revelations from God, that God was highly diſpleaſed with the King for being divorced from the Lady *Katherine*, and that in caſe he perſiſted in the ſeparation, and ſhould marry another, that he would not continue King above one month after; becauſe this tended to the depriving of the lawfull ſucceſſion to the Crowne, ſhe is attainted of Treaſon.

In the Parliament 2. & 3. *H.6. cap.*16. the Lord Admiral of England was attainted of Treaſon for procuring the Kings Leters to both Houſes of *Parliament*, to be good to the ſaid Earle in ſuch matters as hee ſhould declare unto them, for ſaying that he would make the *Parliament* the blackeſt *Parliament* that ever was in England, endevoring to marry the Lady *Elizabeth* the Kings ſiſter, taking a bribe of *Sherrington*, accuſed of Treaſon, & thereupon conſulting with Counſell for him, & ſome other crimes, none of them Treaſon, ſo cleerely within the ſtatute of 25. *E.*3. or any other ſtatute as is the caſe in queſtion.

My Lords, All theſe Attainders, for ought I know, are in force at this day; the ſtatutes of the 1 *H.*4 and the 1. Qu. *Mary*, altough they were willing to make the Statute of the 25. yeare of *E.*3. the Rule of the inferiour Courts, yet they left the Attainders in *Parliament* precedent to them ſelves untoucht, wherein the *Legiſlative* power had bin exerciſed. There's nothing nothing in them whence it can be gathered, but that they intended to leave it as free for the future.

My Lords, in all theſe Attainders, there were crimes and offences againſt the Law, they thought it not unjuſt, circumſtances conſidered, to heighten and add to the degrees of puniſhment, and that upon the firſt offender.

My Lords, We receive, as juſt, the other Lawes and ſtatutes made by theſe our Anceſtors: They are the rules we go by in other caſes, why ſhould wee differ from them in this alone?

Theſe (my Lords) are in part thoſe things which have ſatisfied the Commons in paſſing the Bill: but it is now left to the Judgement and Juſtice of your Lordſhips.

FINIS.